

LABOR CABINET
Department of Workplace Standards
(New Administrative Regulation)

803 KAR 1:081. Board, lodging, gratuities and other allowances.

RELATES TO: KRS 337.275, 337.285

STATUTORY AUTHORITY: KRS 337.295

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.295 authorizes the commissioner to promulgate administrative regulations permitting allowances as part of the wage rates applicable under the statutes for board, lodging, gratuities, and other facilities. The function of this administrative regulation is to set forth what allowances may be credited toward the payment of wages as required KRS Chapter 337.

Section 1. Definitions. (1) "Tip" means a sum presented by a customer as a gift or gratuity in recognition of some service performed. A tip is distinguished from a payment of a charge made for the service.

(2) "Tipped employees" is defined in KRS 337.010(2)(d).

(3) "Wages" is defined in KRS 337.010(1)(c).

Section 2. Board, Lodging, and Other Facilities. (1) In accordance with KRS 337.275 and 337.285, an employer may be permitted to include as wages paid to an employee, the reasonable cost of furnishing an employee with board, lodging, or other facilities if they are customarily furnished by the employer to employees.

(a) Reasonable cost shall not include a profit to the employer or to any affiliated person.

(b) This section shall not prohibit payment of wages in facilities furnished either as additions to a stipulated wage or as items for which deductions from the stipulated wage will be made. The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where customarily furnished to the employee. Not only shall the employee receive the benefits of the facility for which the employee is charged, but it is essential that the acceptance of the facility be voluntary and uncoerced.

(2) The criteria for board, lodging, or other facilities being customarily furnished as applicable to KRS 337.275 and 337.285 are as established in 29 C.F.R. 531.31.

(3) Other facilities.

(a) The criteria for "other facilities" as applicable to KRS 337.275 and 337.285 are as established in 29 C.F.R. 531.32(a).

(b) The cost of furnishing facilities which are primarily for the benefit or convenience of the employer shall not be recognized as reasonable and shall not be included in computing wages. Facilities primarily for the benefit or convenience of the employer include, but are not limited to:

1. Tools of the trade and other materials and services incidental to carrying on the employer's business;

2. The cost of any construction by or for the employer; and

3. The cost of uniforms and of their laundering, where the nature of the business requires the employees to wear a uniform.

(4) The prohibition of kickbacks as applicable to KRS 337.275 and 337.285 is as established in 29 C.F.R. 531.35.

(5) The criteria for payment where additions or deductions are involved in nonovertime workweeks as applicable to KRS 337.375 and 337.285 are as established in 29 C.F.R. 531.36(a).

(6) Overtime workweeks.

(a) Pursuant to KRS 337.285, employees shall receive compensation for overtime hours at a rate of not less than one and one-half (1 1/2) times the rate at which the employee is employed. When overtime is worked by an employee who receives the whole or part of his or her wage in facilities and it becomes necessary to determine the portion of wages represented by facilities, all of the facilities shall be measured by the requirements of this administrative regulation.

(b) Deductions may be made on the same basis in an overtime workweek as in non-overtime workweeks, if their purpose and effect are not to evade the overtime requirements of KRS 337.285. However, the amount deducted shall not exceed the amount which could be deducted if the employee had only worked the maximum number of straight-time hours during the workweek. Deductions in excess of this amount for the items shall be illegal in overtime workweeks as well as in non-overtime workweeks. There is no limit on the amount which may be deducted for board, lodging, or other facilities in overtime workweeks provided that these deductions are made only for the reasonable cost of the items furnished.

(c) Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made. Where board, lodging, or other facilities are customarily furnished as addition to a cash wage, the reasonable cost of the facilities to the employer shall be considered as part of the employee's regular rate of pay.

Section 3. Payment Made to Person Other than Employee. (1) Amounts deducted for taxes. Taxes which are assessed against the employee and which are collected by the employer and forwarded to the appropriate governmental agency may be included as wages. This principle is applicable to the employee's share of Social Security, as well as other federal, state, or local taxes. No deduction shall be made for any tax or share of a tax which the law requires to be borne by the employer.

(2) The criteria for payments to third persons pursuant to a court order applicable to KRS 337.275 and 337.285 are as established in 29 C.F.R. 531.39(a).

(3) The criteria for payments to an employee's assignee applicable to KRS 337.275 and 337.285 are as established in 29 C.F.R. 531.40.

Section 4. Payment of Wages to Tipped Employees. (1) Conditions for taking tip credits in making wage payments.

(a) The wage credit permitted on account of tips under KRS 337.275(2) shall be taken only with respect to wage payments made under KRS Chapter 337 to those employees whose occupations in the workweeks for which the payments are made are those of "tipped employees."

(b) To determine whether a tip credit may be taken in paying wages to a particular employee, it is necessary to know:

1. What payments constitute tips;
2. Whether the employee receives more than thirty (30) dollars a month in payments in the occupation in which the employee is engaged; and
3. Whether in the occupation the employee receives these payments in that amount customarily and regularly.

(2) General characteristics of tips.

(a) To qualify as a tip, the customer shall determine:

1. Whether a tip is given;
2. The amount of the tip; and
3. Who shall be the recipient of the tip.

(b) Only tips actually received by an employee as money belonging to the employee which are used as the employee chooses free of any control by the employer, shall be counted in

determining whether the employee is a tipped employee within the meaning of the KRS Chapter 337 and in applying the provisions of KRS 337.275(2).

(3) The following shall not be considered tips:

(a) Criteria established in 29 C.F.R. 531.55(a);

(b) Where the employment agreement is such that amounts presented by customers as tips belong to the employer and shall be credited or turned over to the employer, the employee is in effect collecting for his or her employer additional income from the operations of the employer's establishment. Even though the amounts are not collected by imposition of any compulsory charge on the customer, the employee is not receiving tips within the meaning of KRS Chapter 337.

(4) More than thirty (30) dollars a month in tips. If an employee employed is not a tipped employee, the employee shall receive the full compensation required by KRS Chapter 337 in cash or allowable facilities without any credit for tips received.

(a) Pursuant to KRS 337.010(2)(d), the definition of tipped employee does not require that the calendar month be used in determining whether more than thirty (30) dollars a month is customarily and regularly received as tips. A recurring monthly period beginning on the same day of the calendar month may be used.

(b) The fact that an employee is part of a group which has a record of receiving more than thirty (30) dollars a month in tips shall not qualify the employee as a tipped employee.

(5) The criteria for "customarily and regularly" as applicable to KRS 337.010(2)(d) are as established in 29 C.F.R. 531.57.

(6) Criteria for the exception of initial and terminal months of employment from the requirement that a tipped employee receive more than thirty (30) dollars a month in tips is as established in 29 C.F.R. 531.58.

(7) The tip wage credit. In determining compliance with the wage payment requirements of the statutes, under the provisions of KRS 337.275(2) the amount paid to a tipped employee by an employer is deemed to be increased on account of tips by an amount equal to the formula set forth in statute provided that the employer satisfies all the requirements in the workweek for which the wage payment is made.

(a) This credit is in addition to any credit for board, lodging, or other facilities which may be allowable under this administrative regulation. The actual amount is left by the statute to determination by the employer on the basis of the employer's information taken from his or her records concerning the tipping practices and receipts in the establishment. In order for an employer to take the maximum credit allowed by this special provision, the tipped employee shall receive the maximum in actual tips.

(b) If the employee is receiving less than the amount credited, the employer is required to pay the balance so that the employee receives at least the minimum wage with the combination of wages and tips. The tip credit shall be taken only for hours worked by the employee in an occupation in which the employee qualifies as a tipped employee. An employer shall not use any part of an employee's tips to pay the minimum wage to any employee; but may only apply credit toward the payment of the minimum wage to the employee who actually received the tip. Under employment agreements requiring tips to be turned over or credited to the employer to be treated as part of the employer's gross receipts, the employer shall pay the employee the full minimum hourly wage.

(8) Overtime payments. When overtime is worked by a tipped employee who is subject to the overtime pay provisions of KRS 337.285, the regular rate of pay is determined by dividing the employee's total remuneration for employment in any workweek by the total number of hours actually worked in that workweek for which the compensation was paid. A tipped employee's regular rate of pay includes the amount of tip credit taken by the employer (not in excess of the

formula set forth in statute), the reasonable cost of any facilities furnished the employee by the employer, and the cash wages including commissions and bonuses paid by the employer. Any tips received by the employee in excess of the tip credit need not be included in the regular rate. The tips are not payments made by the employer to the employee as remuneration for employment.

(9) Tip pooling. Pursuant to KRS 337.275(2), employees may enter into an agreement to divide tips among themselves. Where employees enter into this type of agreement, the amounts retained by the employees are considered tips of the individuals who retain them. Where an employer requires employees to pool tips, no credit shall be taken and the employer shall pay the employee the full minimum wage.

Section 5. Records. Where an employer uses the reasonable cost of furnishing an employee with board, lodging, or other facilities in meeting the requirements of KRS 337.275 and 337.285, it shall be necessary to keep the following records, in addition to those required by KRS 337.320:

- (1) The facility being provided by the employer to the employee; and
- (2) The cost being charged for the facility by the employer.

KIMBERLEE C. PERRY, Commissioner

JAMIE LINK, Secretary

APPROVED BY AGENCY: January 3, 2022

FILED WITH LRC: January 10, 2022

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on March 28, 2022 at 1:00pm (ET). This hearing will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 1, subparagraph 8(b) (R.S. 2020) and the continuing state of emergency due to the novel coronavirus pandemic. Public access to the meeting will be available at <https://us06web.zoom.us/j/88108844438>, or by telephone at (713) 353-0212 or 888-822-7517 (toll free), conference code 786462. Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through March 31, 2022. Send notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Duane Hammons, Labor Cabinet, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, Kentucky 40601, phone (502) 564-1507, fax (502) 564-5484, email Kenneth.hammons@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Duane Hammons

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation clarifies what allowances may be credited toward the payment of wages as required in KRS 337.275 and 337.285.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to clarify what allowances may be credited toward the payment of wages as required in the statutes.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 337.295 authorizes the commissioner to promulgate administrative regulations permitting allowances as part of the wages rate applicable under the statutes for board, lodging, gratuities, and other facilities.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides guidance on what allowances may be credited toward payment of wages to ensure that employees receive proper wages.

(2) If this is an amendment to an existing regulation, provide a brief summary of:

(a) How this amendment will change this existing administrative regulation:

(b) The necessity of the amendment to this administrative regulation:

(c) How the amendment conforms to the content of the authorizing statutes:

(d) How the amendment will assist in the effective administration of the statutes:

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation affects all subject employers who employ employees in the Commonwealth subject to KRS Chapter 337, as well as their employees.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional compliance duties are required by this administrative regulation as it is replacing 803 KAR 1:080.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no additional cost associated with this administrative regulation as it is replacing 803 KAR 1:080.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Improved employee protection and guidance for what employers on wage allowances.

(5) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: This administrative regulation is not anticipated to generate any new or additional costs as it is replacing 803 KAR 1:080.

(b) On a continuing basis: This administrative regulation is not anticipated to generate any new or additional costs as it is replacing 803 KAR 1:080.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current state funding.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new or by the change if it is an amendment: This administrative regulation is not anticipated to generate any increase in fees or funding as it is replacing 803 KAR 1:080.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: There are no fees associated with this administrative regulation.

(9) TIERING: Is tiering applied? Tiering is not applied. All employers and employees covered by KRS Chapter 337 are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

(1) What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? Most state and local governmental entities are subject to KRS Chapter 337.

(2) Identify each state or federal statute or regulation that requires or authorizes the action taken by the administrative regulation. KRS 337.295.

(3) Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation will not generate revenue.

(b) How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation will not generate revenue.

(c) How much will it cost to administer this program for the first year? There is no cost to this administrative regulation as it is replacing 803 KAR 1:080.

(d) How much will it cost to administer this program for subsequent years? There is no cost to this administrative regulation as it is replacing 803 KAR 1:080.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Unknown

Expenditures (+/-): Unknown

Other Explanation: This administrative regulation does not impose any additional requirements or expenditures as it is replacing 803 KAR 1:080.